



# COMMONWEALTH of VIRGINIA

## DEPARTMENT OF ENVIRONMENTAL QUALITY

W. Tayloe Murphy, Jr.  
Secretary of Natural Resources

### PIEDMONT REGIONAL OFFICE

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Robert G. Burnley  
Director

Gerard Seeley, Jr.  
Piedmont Regional Director

## STATE WATER CONTROL BOARD ENFORCEMENT ACTION SPECIAL ORDER BY CONSENT ISSUED TO THE GROVE L. P.

### SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code §§ 10.1-1185 and 62.1-44.15(8a) and (8d), between the State Water Control Board and The Grove L.P. for the purpose of resolving certain violations of environmental law and regulations.

### SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Va. Code" means the Code of Virginia (1950), as amended.
2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 10.1-1183.
4. "Director" means the Director of the Department of Environmental Quality.
5. "Order" means this document, also known as a Consent Special Order.
6. "Permit" means VWP Permit No. 98-0564, issued to The Grove L.P. on August 11, 1998 and expired on August 11, 2003.

7. “The Grove” means The Grove L.P. certified to do business in Virginia and its affiliates, partners, subsidiaries, and parents.
8. “Subdivision” means the construction of a 270 acre residential development called The Grove Subdivision located off Coalfield Road, south of its intersection with Route 60 in Chesterfield County, Virginia.
9. “PRO” means the Piedmont Regional Office of DEQ, located in Glen Allen, Virginia.

### **SECTION C: Findings of Fact and Conclusions of Law**

1. The Grove is in the process of constructing a 270-acre residential subdivision known as The Grove Subdivision, for which a VWP permit was issued on August 11, 1998. The Permit allowed impacts to 0.86 acres of wetlands and 0.7 acre of open waters for the construction of road crossings, fill for lots, storm water management ponds, and storm water pipe outfall protection. The Permit required compensatory mitigation in the form of: 1.464 acres of wetland enhancement; 1.21 acres of wetland creation; preservation of 3.44 acres of upland buffer around the wetland creation area; and preservation of the remaining 5 acres of wetlands. The wetland creation consists of 0.73 acre of created wetlands with the construction of five levees, and 0.48 acre of created wetlands adjacent to the largest storm water management pond. Mitigation for open water impacts will be on site and in the form of 3,000 linear feet of stream bank restoration.
2. In November 2002, DEQ staff conducted a site visit at the Subdivision. The staff observed problems with flagging requirements, and erosion and sediment (E&S) control measures, as required by the Permit (Part I.A.7). Staff also observed that fences had been constructed around four residential lots within the portion of the 5 acres of wetlands set aside as a non-impact wetland preservation area. Deed Restrictions, recorded on October 8, 1999, specifically prohibit construction of fences within this non-impact wetland area. (Part I.C.3)
3. A Warning Letter was sent to The Grove on December 27, 2002, for the above listed violations
4. By letter dated January 9, 2003, The Grove reported compliance with the flagging and E&S control measures cited in the Warning Letter. On February 27, 2003, DEQ staff made a site visit and confirmed compliance with the flagging and E&S control measures.
5. During the November 2002 site visit, and subsequent site visits, DEQ staff observed that The Grove had not planted the 0.48 acre on-site compensatory wetland creation. (Part I.C.1)

6. On August 1, 2003, The Grove requested a permit extension to complete the compensatory mitigation requirements of the Permit.
7. DEQ conducted a file review and made a site visit on August 1, 2003. During the site visit, staff observed that the fences that had been constructed around the four residential lots in the non-impact wetland preservation area were still in place (Part I.C.3), part of a stream mitigation area was failing (Part I.C.10), and the 0.48 acre wetland creation site had been graded but it had not been planted and therefore lacked an established wetland community (Part I.C.1 and Part I.C.11). The file review revealed that a final wetland report had not been submitted (Part I.E.1) and the Permit renewal application, which was due on February 13, 2003, had not been submitted (Part I.I).
8. DEQ responded to the August 1, 2003 correspondence from The Grove by letter dated August 26, 2003, stating that a number of unresolved issues remained regarding the Permit.
9. On August 11, 2003, the Permit expired for The Grove L.P.
10. On October 16, 2003, The Grove and DEQ met to discuss unresolved issues, including the reissuance of the Permit.
11. Due to a lack of success in resolving the above mentioned issues, DEQ issued a Notice of Violation (NOV) to the The Grove on March 9, 2004, citing failure to plant, or establish the 0.48 acre on-site compensatory wetland creation (Part I.C.1 & Part I.C.11); failure to comply with the Deed Restrictions in the non-impact wetland area as a result of the construction of fences by individual homeowners (Part I.C.3); failure to submit a Corrective Action Plan to address the failing compensatory mitigation sites (Part I.C.10); failure to submit a final wetland mitigation report within 180 days prior to permit expiration (Part I.E.1); and failure to submit application for permit renewal within 180 days prior to permit expiration (Part I.I).
12. The Grove responded to the NOV by letter dated March 16, 2004; faxed on March 25, 2004, a final wetland mitigation report excluding the 0.48 bench wetland; and met with DEQ on March 26, 2004.
13. At the March 26, 2004 meeting, The Grove stated that: 1) the planting of the 0.48 bench wetland had been delayed due to delays in receiving approval by Chesterfield County for the release of the stormwater pond; 2) the 0.48 bench wetland had been planted at the end of October 2003; 3) they had created additional acreage of on-site wetlands that compensates for the impacts of the fences in the non-impact wetland preservation area, 4) the failing wetland creation site was scheduled for replanting and a herbicide treatment on June 15, 2004; 5) and they agreed to submit a complete application for the reissuance of the Permit.

14. The Grove submitted a request for permit reissuance on March 26, 2004. In order to complete the application, The Grove submitted the permit fee in September 2004.
15. On September 23, 2004, The Grove provided correspondence from Koontz-Bryant dated September 8, 2003, to show that information had been submitted to DEQ proposing corrective actions for the project.

#### **SECTION D: Agreement and Order**

Accordingly, the Board, by virtue of the authority granted it in Va. Code § 62.1-44.15(8a) and (8d), orders The Grove, and The Grove voluntarily agrees, to pay a civil charge of **\$5,600.00** within 30 days of the effective date of the Order in settlement of the violations cited in this Order. The payment shall note the Federal Identification Number for The Grove. Payment shall be by check, certified check, money order, or cashier's check payable to "Treasurer of Virginia" and sent to:

Receipts Control  
Department of Environmental Quality  
Post Office Box 10150  
Richmond, Virginia 23240

#### **SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend the Order with the consent of The Grove, for good cause shown by The Grove, or on its own motion after notice and opportunity to be heard.
2. This Order only addresses and resolves those violations specifically identified herein. This Order shall not preclude the Board or the Director from taking any action authorized by law, including, but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility as may be authorized by law; and/or (3) taking subsequent action to enforce the terms of this Order. Nothing herein shall affect appropriate enforcement actions by other federal, state, or local regulatory authority, whether or not arising out of the same or similar facts.
3. For purposes of this Order and subsequent actions with respect to this Order, The Grove admits the jurisdictional allegations, but does not admit the factual findings, and conclusions of law contained herein.
4. The Grove consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.

5. The Grove declares it has received fair and due process under the Administrative Process Act, Va. Code §§ 2.2-4000 *et seq.*, and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.
6. Failure by The Grove to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. The Grove shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. The Grove shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. The Grove shall notify the DEQ Regional Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
  - a. the reasons for the delay or noncompliance;
  - b. the projected duration of any such delay or noncompliance;
  - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
  - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director within 24 hours of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

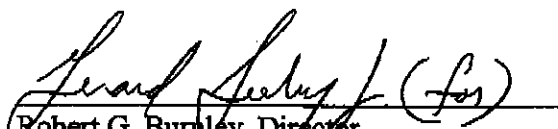
9. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.

10. This Order shall become effective upon execution by both the Director or his designee and The Grove notwithstanding the foregoing, The Grove agrees to be bound by any compliance date which precedes the effective date of this Order.
11. This Order shall continue in effect until:
- a. The Grove petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
  - b. The Director or Board terminates the Order in his or its sole discretion upon 30 days notice to The Grove.

Termination of this Order, or of any obligation imposed in this Order, shall not operate to relieve The Grove from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. By its signature below, The Grove voluntarily agrees to the issuance of this Order.

And it is so ORDERED this day of December 3, 2004.

  
Robert G. Burnley, Director  
Department of Environmental Quality

The Grove voluntarily agrees to the issuance of this Order.

By:  \_\_\_\_\_

Date: 10/8/04 \_\_\_\_\_

Commonwealth of Virginia

City/County of Richmond

The foregoing document was signed and acknowledged before me this 5th day of October, 2004, by Herbert E Fitzgerald III, who is  
(name)  
manager of The Grove, on behalf of The Grove.  
(title)

Margaret Wood  
Notary Public

My commission expires: 10/31/05